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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

EDNA ESPAÑOL, Plaintiff and Appellant, v. J. EDWARD KERLEY et al., Defendants and Respondents.	A153022 (Alameda County Super. Ct. No. RG15-786687)

This lawsuit arises out of a dispute between plaintiff Edna Español and defendants J. Edward Kerley and Jahn Miller. Español was party to an arbitration agreement with Kerley, but not with Miller. The trial court granted Kerley's motion to compel arbitration and stayed further proceedings against Miller. Español now appeals from a judgment entered against her on an arbitration award in favor of Kerley.

Español advances two lines of argument. First, she contends that the trial court should have refused to enforce the arbitration agreement under Code of Civil Procedure section 1281.2, subdivision (c)(1).[1] Second, she contends that the trial court should not

[1] All further undesignated statutory references are to the Code of Civil Procedure.

Prior to 2018, section 1281.2 required a trial court to enforce a written arbitration agreement unless one of three exceptions (found in subds. (a)-(c)) applied. (Former § 1281.2, as amended by Stats. 1978, ch. 260, § 1, p. 543 (former § 1281.2).) The statute now includes a fourth exception (subd. (d)), as explained further below. For ease of reference, we will refer in this opinion to the provisions setting forth the discretionary options available to the trial court under the third exception (subd. (c)), both in the

have sent her to arbitration because she pleaded intentional tort claims that fell outside the scope of her arbitration agreement with Kerley.

We see no error on either ground. It is true that the trial court could have invoked section 1281.2, subdivision (c)(1) once it found there was a possibility of conflicting rulings, but it also had discretion to handle the situation as it did under section 1281.2, subdivision (c)(3). We decline to second-guess the discretionary choice the court made. Nor do we see any error with respect to the scope of the arbitration agreement. What Español overlooks is that, under the rules of the arbitral body called for in the arbitration agreement (the Judicial Arbitration and Mediation Service [JAMS]), the scope of arbitrable issues was a matter for the arbitrator to decide. The arbitrator's decision to decide the intentional tort claims is not now subject to judicial review.

Accordingly, we will affirm.

I. BACKGROUND

In September of 2011, Español filed an insurance claim with Travelers Insurance to recover damages to her house caused by a fallen tree. Español was not satisfied by the insurance company's offer of $28,825.39 in compensation and hired defendant Miller, a public insurance adjuster, to negotiate a higher offer. Miller negotiated with Travelers and obtained a settlement offer of $43,637. Español paid Miller for his services but remained unsatisfied with the offer. At that point, Miller told Español that she would need to file a lawsuit against Travelers to obtain better terms. Miller then referred Español to Kerley, an attorney, to represent her in her lawsuit.

Kerley and Español entered into a contractual agreement and Kerley then filed a suit against Travelers on Español's behalf. The suit against Travelers ultimately settled and Kerley withheld his contractual fee. Kerley also withheld an additional fee to further compensate Miller. Español demanded that Kerley relinquish that additional money to

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recently amended statute, and in the former version of the statute, as section 1281.2, subdivisions (c)(1) through (4).

her and claimed that Miller was not entitled to the money because he was paid for his services, did not participate in the litigation, and was not mentioned in the contract.

In December of 2014, Español filed a disciplinary complaint against Kerley with the State Bar for refusing to release the withheld funds to her. The State Bar did not find any misconduct by Kerley requiring discipline. Español claimed that Kerley and Miller colluded and lied to the State Bar during investigations to prevent further action. Español, who is a licensed attorney, contended that the defendants' statements to the State Bar damaged her professional reputation and caused her emotional and physical distress which required medical care.

Because Español disputed Miller's claim to the second withholding, Kerley held the money in trust and, in May of 2015, filed an interpleader action with Español and Miller as the interpleader defendants. Español filed cross-complaints against Kerley and Miller for causes of action beyond the interpleading of funds. The court sustained Kerley's demurrer to the cross-complaint and directed Español to refile the causes of action in the cross-complaint against Kerley in a separate action. Español then filed the present suit against Kerley and Miller in superior court, alleging nearly identical claims to the ones pleaded in her cross-complaint.

In this case, Español alleged breach of contract and breach of fiduciary duty against Kerley, fraud against Miller, and fraud, libel, conspiracy, abuse of process, intentional infliction of emotional distress, and negligent infliction of emotional distress against both Kerley and Miller. Kerley immediately filed a motion to compel arbitration based on a term in the contract between Kerley and Español. The arbitration provision required the two parties to resolve through arbitration all claims arising out of or relating to a claimed breach of the agreement, professional services rendered by Kerley, or the professional relationship between Kerley and Español. The arbitration clause further provided that any arbitration would be administered by JAMS, pursuant to its rules and procedures. The JAMS rules at the time of the agreement stated that disputes over the scope of the agreement would also be settled by the arbitrator.

The trial court ruled that Kerley had not waived his right to arbitrate and was therefore entitled to arbitration. In response to Español's contention that some of the Kerley claims were beyond the scope of the arbitration agreement, the court deferred to the arbitrator on that question. The court did not find it appropriate to compel Español to arbitrate her claims against Miller, however, because she was not party to an arbitration agreement with him. In the end, the trial court granted the motion to compel arbitration for the Kerley claims but stayed all claims against Miller pending completion of arbitration in light of the risk of conflicting rulings. The claims in the interpleader action between Español and Miller were stayed for the same reason.

Ultimately, the arbitrator rendered an award for Kerley, the award was confirmed, and Español now appeals from the ensuing judgment.

II. DISCUSSION

A. Code of Civil Procedure Section 1281.2

The central issue raised on appeal is whether the trial court properly stayed the action against Miller while sending Español's claims against Kerley to arbitration.

Generally, when a court finds that an arbitration agreement exists, the court must enforce it. (§ 1281.2.) Section 1281.2 enumerates the circumstances when the court may deny a petition to compel arbitration. (§ 1281.2.) When "[a] party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact" (§ 1281.2, subd. (c)), "the court (1) may refuse to enforce the arbitration agreement and may order intervention or joinder of all parties in a single action or special proceeding; (2) may order intervention or joinder as to all or only certain issues; (3) may order arbitration among the parties who have agreed to arbitration and stay the pending court action or special proceeding pending the outcome of the arbitration proceeding; or (4) may stay arbitration

pending the outcome of the court action or special proceeding." (§ 1281.2, subd. (c)(1)-(4).)[2]

We review a trial court's ruling under section 1281.2, subdivision (c) for abuse of discretion. (*Metis Development LLC v. Bohacek* (2011) 200 Cal.App.4th 679, 691.) So long as a court " 'select[s] the proper legal standards in making' " a discretionary determination (*Fox v. Superior Court* (2018) 21 Cal.App.5th 529, 533), there is no abuse of discretion if it acts within the " 'bounds of reason' " in applying the law. (*People v. Preyer* (1985) 164 Cal.App.3d 568, 573.)

Citing *Mastick v. TD Ameritrade, Inc.* (2012) 209 Cal.App.4th 1258 (*Mastick*), *Daniels v. Sunrise Senior Living, Inc.* (2013) 212 Cal.App.4th 674 (*Daniels*), and

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[2] As noted above, the statute, as recently amended, now includes a fourth exception. (See *ante*, fn. 1.) In both the pre-2018 and the current versions of the statute, the exception in subdivision (c), which we discuss in more detail below, applies when a party to the arbitration agreement "is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact." (§ 1281.2, subd. (c); former § 1281.2, subd. (c).)

Also in both the current and former versions of the statute, after listing these exceptions (in subds. (a)-(c) of former § 1281.2; in subds. (a)-(d) of current § 1281.2), there are three additional paragraphs. The first states arbitration may not be refused on the ground that the contentions of the party seeking to compel arbitration "lack substantive merit." (§ 1281.2; former § 1281.2.) The second paragraph states that, in some circumstances, the court may delay its order to arbitrate if there are other issues between the parties to the arbitration agreement that are not subject to arbitration. (§ 1281.2; former § 1281.2.)

The third and final paragraph states that if a party to the arbitration is also a party to litigation with a third party as set forth under subdivision (c), the court may proceed by choosing one of four listed options (numbered (1)-(4)). (§ 1281.2; former § 1281.2.) Although these options do not appear within or immediately after the main body of subdivision (c) (and are separated from it both by the new subd. (d) and by two other unnumbered paragraphs), the listed options become available to the trial court only if the conditions specified in subdivision (c) apply.

None of the recent revisions to the statute affects the analysis here substantively, but since the numbering and organization of some of the pertinent subdivisions has changed, we take note of the changes for the sake of clarity.

Fitzhugh v. Granada Healthcare & Rehabilitation Center, LLC (2007) 150 Cal.App.4th 469 (*Fitzhugh*), Español argues that the trial court erred in ordering her to arbitration with Kerley because she remains in litigation against Kerley's codefendant, Miller, who did not agree to arbitrate. *Mastick*, *Daniels*, and *Fitzhugh* are cases where, in order to prevent conflicting rulings arising out of an arbitration on issues that overlapped with a pending lawsuit, the trial court exercised its discretion to refuse arbitration despite the existence of an arbitration agreement among some parties to the suit. (*Mastick*, *supra*, 209 Cal.App.4th at p. 1262; *Daniels*, *supra*, 212 Cal.App.4th at pp. 676, 678-679; *Fitzhugh*, *supra*, 150 Cal.App.4th at p. 472.) The appellate court affirmed that discretionary choice in each case. (*Mastick*, *supra*, 209 Cal.App.4th at p. 1265 [affirming exercise of discretion under § 1281.2, subd. (c) where arbitration agreement directed application of California law]; *Daniels*, *supra*, 212 Cal.App.4th at pp. 677, 686; *Fitzhugh*, *supra*, 150 Cal.App.4th at p. 476.) But the fact a trial court can invoke section 1281.2, subdivision (c)(1) to deny arbitration does not mean that it must always do so. Section 1281.2 confers discretion to choose several other options, including the choice of sending one set of parties to arbitration, while holding the remainder of the action in abeyance. (§ 1281.2, subd. (c)(3).) That is the course the trial court chose here.

Español's complaint, as we understand it, is that the option of parceling out some parties and issues to an arbitrator while staying the remainder of the action pending the outcome of the arbitration does not eliminate the possibility of conflicting rulings and therefore cannot be a correct application of section 1281.2, subdivision (c) as a matter of law. But she fails to appreciate that eliminating the possibility of conflicting rulings is not the sole consideration the Legislature sought to address when it created multiple procedural options in subdivisions (c)(1) through (c)(4). If a trial court chooses *not* to refuse arbitration under subdivision (c)(1)—exercising its discretion in just the opposite way the trial courts in *Mastick*, *Daniels* and *Fitzhugh* did—subdivision (c)(3) authorizes the court to stay the lawsuit while the arbitration is ongoing. That is a simple matter of fairness, since it prevents any party from having to face the demands of simultaneous litigation in multiple fora.

Español correctly points out that because Miller, as a stranger to her arbitration with Kerley, would never be able to claim that anything in the arbitration has issue preclusive effect against her in court (*Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 836), staying the lawsuit pending the outcome of the arbitration does not eliminate the possibility of conflicting rulings (only a decision to keep all issues and parties in a single forum under section 1281.2, subdivision (c)(1) would have done that). But the prospect of "conflicting rulings" does not necessarily mean binding rulings. Thus, we reject Español's suggestion that, whenever there is a potential conflict, section 1281.2, subdivision (c)(3) does not apply. In section 1281.2, the Legislature created a menu of options for a situation where some parties to a lawsuit have agreed to arbitrate, and others have not. The first option, refusing arbitration outright, the course chosen in *Mastick*, *Daniels*, and *Fitzhugh*, is authorized by section 1281.2, subdivision (c)(1). If a trial court declines to choose that option, further down the menu is subdivision (c)(3), which has the advantage of respecting the arbitration agreement while enforcing it in a way that does not expose any party to the potential unfairness of litigating on two fronts.

It cannot be said that selecting this legislatively authorized course of action is somehow outside the bounds of reason. We therefore conclude that the trial court's choice to forego section 1281.2, subdivision (c)(1) and proceed instead under section 1281.2, subdivision (c)(3) was within the range of its discretion.

B. Scope of the Arbitration Agreement

Español also argues that the trial court should not have sent the case to arbitration because her intentional tort claims fall outside of the scope of the arbitration agreement. The trial court, however, never ruled on whether these claims are subject to arbitration. The court explicitly left that question to the arbitrator to decide, consistent with JAMS' rules at the time that the parties signed the arbitration agreement. In her opening brief, Español does not dispute whether the arbitrator is the proper decisionmaker on scope-of-

arbitrability issues.[3] Because Español does not contest this point, we must presume the correctness of the trial court's decision to send scope-of-arbitrability questions to the arbitrator. (See *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) Essentially, then, her argument boils down to an attack on the arbitrator's decision to decide her intentional tort claims. But of course "arbitrator decisions cannot be judicially reviewed for errors of fact or law even if the error is apparent and causes substantial injustice." (*Berglund v. Arthroscopic & Laser Surgery Center of San Diego, L.P.* (2008) 44 Cal.4th 528, 534; see *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 33.) Thus, we see no error here either.

III. DISPOSITION

The judgment is affirmed. Respondent shall recover costs.

[3] She does contest the point in her reply brief, but we generally do not consider arguments raised for the first time in reply (*Neighbours v. Buzz Oates Enterprises* (1990) 217 Cal.App.3d 325, 335, fn. 8), and we will not do so here.

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STREETER, Acting P.J.

We concur:

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TUCHER, J.

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BROWN, J.

A153022/*Español v. Kerley*